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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KENNETH HILTON,
Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT M. WEINBERG
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women; many of these workers are employed in the transportation industries covered by the Federal Employers' Liability Act and are thus affected by this case.

SUMMARY OF ARGUMENT

This case does not present any issue of constitutional law but simply and only an issue of statutory interpretation: Did the Congress that enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA") intend the words "[e]very common carrier by railroad while engaging in commerce between any of the several States" to include a common carrier by railroad engaging in interstate commerce that is owned and operated by a State?

This precise question has already been answered in the affirmative by this Court. *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964). This Court has reached the same conclusion in interpreting the virtually identical statutory language in other statutes regulating the interstate railroad system. *See infra* at 6. And this Court has consistently held that other federal regulatory statutes employing broad general terms of coverage—and not containing language providing in terms for coverage of state-owned enterprises—do cover state-owned enterprises that are within the general statutory coverage language. *See infra* at 6-7.

The South Carolina Supreme Court's conclusion that the FELA does not apply to state-owned railroads is based on a misreading of *Will v. Michigan Dep't of State Police*, 491 U.S. 1 (1980), a misreading that, if followed, would overrule or call into serious question a long line of this Court's statutory interpretation decisions. *See infra* 7-13.

The "unmistakably clear" rule of statutory interpretation stated in *Will* applies, by its terms, only when a proffered interpretation of a federal statute would alter the usual "balance between the States and the Federal Government" in a way that limits the "historic powers of the States. *See infra* at 7-9. As numerous decisions of this Court reflect, where Congress regulates a class of all entities engaged in a particular form of economic activity that is overwhelmingly but not entirely comprised

of privately-owned enterprises—and where the regulation is through rules that are intended to impose uniform obligations on the members of the class—the coverage of state-owned enterprises by the regulation is entirely consistent with the usual balance of our federal-state system. *See infra* at 10-13.

The FELA's application to state-owned railroads is the paradigm of the type of regulation of state-owned "business[es] of a private nature" (*Ohio v. Helvering*, 292 U.S. 360, 369 (1934)) that does not alter the usual "balance between the States and the Federal Government." That being so, the "unmistakable clear" rule of interpretation stated in *Will* does not govern this case.

In a series of decisions, this Court has developed and applied a consistent approach to determining whether a federal statute generally regulating industrial or commercial conduct is intended to apply to state-owned entities that engage in activities within the statute's zone of regulation. *See infra* at 14-17. In formulating this approach, the Court has expressly excluded any reliance on presumptions or presuppositions—including the rule of construction applied by the South Carolina Supreme Court—and has instead relied entirely on the language, purposes, and legislative history of the statute being interpreted. Application of that approach in this case leaves little doubt that the issue of the proper interpretation of the FELA, which the state defendant in this case wishes to revisit, was correctly decided in the first instance in *Parden*. *See infra* at 17-24.

Finally, even assuming *arguendo* that there were doubts about *Parden's* statutory holding—and that the FELA arguably contains an unwritten exception to "[e]very," the word that *is* written in the statutory language—there would still be no basis for a departure from *stare decisis* under the circumstances of this case. *See infra* at 24-26.

ARGUMENT

The Federal Employers' Liability Act (FELA) provides that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce" as a result of the carrier's negligence. 45 U.S.C. § 51.

The question in this case is whether the statutory words "[e]very common carrier by railroad while engaging in commerce between any of the several States" cover all such common carriers—including those owned and operated by a State—or only common carriers owned and operated by private parties.

1. Stating the question presented suffices to show that this case arises in the sensitive area of federal-state relations. That being so, it facilitates analysis to begin by recalling the decisions of this Court that establish that this case does *not* present any issue of constitutional law but rather simply and only an issue of statutory interpretation.

Congress, in the first place, has the undoubted commerce clause power to regulate state-owned railroads that are a part of this country's interstate transportation system. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-57 (1985); *see also National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976) (collecting earlier precedents and reaffirming their validity). It is perfectly well settled that the States have *no* constitutional immunity from such federal regulation.

It is equally plain that such federal commerce clause regulation may take the form of a federal cause of action that state courts of competent jurisdiction are by reason of the Supremacy Clause obliged to enforce. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982); *Testa*

v. Katt, 330 U.S. 386, 389-94 (1947); *Second Employers' Liability Cases*, 223 U.S. 1, 56-59 (1911).

It is beyond doubt as well that the Eleventh Amendment has *no* application to a case brought, as here, in a *state* court rather than a federal court. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). To put this last point another way, this is *not* a case that turns in any way on the States' *constitutional* immunity from suit in the federal courts.[1]

2. All this being so, the inquiry in this case, as in any other statutory interpretation case, is one directed to determining congressional intent: Did the Congress that enacted the FELA intend the words "[e]very common carrier by railroad while engaging in commerce between any of the several States" to include a common carrier by railroad engaging in interstate commerce that is owned and operated by a State.

It is very much to the point—indeed we believe it is decisive—that this precise question has already been decided by this Court. In *Parden v. Terminal R. Co.*, 377 U.S. 184, 185 (1964), the Court stated that "Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said";

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[1] Where the scope of a federal statute turns on Congress' intent to abrogate the States' constitutional immunity to suit in the federal courts, this Court demands a clear and express statement in the statute that the States are subject to such suits. *See Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

This demanding rule of construction provides a prophylaxis against the unintended abrogation or forfeiture of the States' constitutional immunity. *See Atascadero*, 473 U.S. at 243; *see also Parden v. Terminal R. Co.*, 377 U.S. 184, 198-200 (1964) (White, J. dissenting). This approach is consistent with this Court's general approach to determining whether a constitutional right has been waived or forfeited. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Colorado* v. *Spring*, 479 U.S. 564, 572-73 (1987).

viz., that the FELA applies to *every* railroad in interstate commerce, whether owned and operated by a State or by a private party.[2]

Parden, moreover, does not stand alone; this Court has reached the same conclusion in interpreting the virtually identical statutory language in other statutes regulating the interstate railroad system. *United States v. California*, 297 U.S. 175, 183-87 (1936) (Safety Applicance Act: "any common carrier engaged in interstate commerce by railroad"); *California v. Taylor*, 353 U.S. 553, 561-68 (1957) (Railway Labor Act: "any carrier by railroad, subject to the Interstate Commerce Act").[3]

The Court has also consistently held that other federal regulatory statutes employing broad general terms to define the statute's coverage—and not containing language providing in terms for coverage of state-owned enterprises—do cover state-owned enterprises that are within the general statutory definition. *See, e.g., Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 154-62 (1983) (state-owned pharmacies covered by Robinson-Patman Act: "any person engaged in commerce"); *California v. United States*, 320 U.S. 577, 585-86 (1944) (state-owned terminal facility covered by Shipping Act of 1916: "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water"); *Ohio v. Helvering*, 292 U.S. 360, 367, 370-71 (1934) (state-owned liquor store covered by Federal Liquor Tax: "[e]very person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors . . ."). *Cf. Fry v. United States*, 421 U.S. 542 (1975) (States are covered by Economic Stabilization Act of 1970: "business and labor and other segments of the economy"); *Board of Trustees v. United States*, 289 U.S. 48 (1933) (federal import duties apply to purchases by state universities); *South Carolina v. United States*, 199 U.S. 437 (1905) (federal liquor tax applies to liquor stores operated by state contractors).

[2] In *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 476-78 (1987), this Court overruled *Parden* to the extent that *Parden* had held that damage suits against state-owned railroads could be asserted in *federal court*. The Court's decision in *Welch* delimited the federal courts' jurisdiction and was grounded squarely on the Eleventh Amendment.

The *Welch* Court expressly stated that it was not reconsidering the quite separate issue of statutory interpretation previously resolved in *Parden*; *viz.*, whether Congress intended the FELA to apply to state-owned railroads. *Welch*, 483 U.S. at 478 n.6. Of course, if Congress had such an intention, then FELA actions against state-owned railroads would be cognizable in the state courts, where the Eleventh Amendment imposes no jurisdictional bar to suit. *See supra* at 5; *see also* 45 U.S.C. 56 (making clear that FELA claims may be brought in state courts).

[3] The Interstate Commerce Act contains similar language, and the Interstate Commerce Commission had, even prior to this Court's decisions, read the Act as covering state-owned railroads. *See infra* at notes 10 & 11.

3. In the face of all this, the Supreme Court of South Carolina concluded that the FELA does not apply to state-owned railroads. The South Carolina Court predicated that conclusion on its reading of this Court's decision in *Will v. Michigan Dep't of State Police, supra*.[4]

If the South Carolina Court correctly understood *Will*, then *Will*, *sub silentio*, would have overruled—or called into serious question—each of this Court's statutory interpretation decisions cited above. The South Carolina Court, however, misread *Will*, as we now show.

(a) The question in *Will* was whether a State is a "person" within the meaning of 42 U.S.C. § 1983, which

[4] The South Carolina Supreme Court's reasoning is set out in an earlier decision not before the Court. *See Freeman v. South Carolina Public Railways Comm.*, 393 S.E.2d 383 (1990) (reprinted in Pet. App. at 9-14). The decision on review here simply dismissed petitioner's FELA action on the authority of this earlier decision. *See* Pet. App. at 7-8.

authorizes suits for damages, as well as injunctive relief, against "[e]very person who, under color of any [law], custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

If the answer to that question were in the affirmative, the entire panoply of state conduct would be subject to challenge in a suit for damages under § 1983. In that context, the Court in *Will* made the following statement relied upon by the South Carolina Court:

> The language of § 1983 also falls short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). [*Will*, 491 U.S. at 65.]

As this passage makes clear, the predicate for the particular "ordinary rule of statutory construction" discussed

by the Court in *Will* is that a proffered interpretation of a federal statute would *"alter the 'usual constitutional balance between the States and the Federal Government' " in a way that limits the "historic powers of the States."* In that context, the argument for a rule of statutory interpretation that preserves the federal order as it has been shaped by time and usage against *unintended* statutory change is self-evident. And the Court's adoption of the "unmistakably clear" rule in this context is well suited to serving that protective purpose.[5]

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[5] We hasten to add that we believe the South Carolina Supreme Court to be incorrect in its apparent assumption that the "unmistakably clear" rule of *Will* requires that the language of the statute specifically and explicitly provide for the application of the statute to state entities—that is, that the States or state-owned entities be expressly referenced in the language of the statute.

Will did not purport to be adopting a new rule of statutory interpretation. Indeed, the *Will* Court said that it was applying the pertinent "ordinary rule" of interpretation. 491 U.S. at 65. Except in cases where the question raised is whether Congress intended to abrogate the Eleventh Amendment rights of the States—a question that raises peculiar constitutional concerns not present here, *see* n.1, *supra*—there is no ordinary rule of construction that requires a clear and express statement on the face of a statute of Congress' intent to regulate the States. While the *Will* Court did cite and quote from *Atascadero State Hospital v. Scanlon, supra*, the Court went on to state that, "*Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts." 491 U.S. at 65. None of the cases cited by *Will* as representative of these "other contexts" supports the South Carolina Supreme Court's reading of *Will* that the intention to regulate the States must be directly expressed in the statutory language.

Thus, the *Will* Court cited *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), as standing for the proposition that "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States . . . ." 491 U.S. at 65. But, at the page cited in *Will*, the *Rice* Court states that the "purpose" of Congress which is required to be "clear and manifest"

> may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it . . . . Or the Act of Congress may touch a field in which the federal

(b) By a parity of reasoning, where the large purposes spelled out in *Will* are not in point there is *no* basis for applying the rule of interpretation stated in *Will* to effectuate those purposes. That is the situation here. The salient point is that subjecting state-owned railroads to the

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> interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose . . . . Or the state policy may produce a result inconsistent with the objective of the federal statute . . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. [331 U.S. at 230-231 (citations omitted).]

Similarly, none of the remaining cases cited in *Will* contain a requirement that an intent to regulate the States be directly and explicitly stated in the statutory language. Indeed, in *United States v. Bass*, 404 U.S. 336, 349-350 (1971), the Court based its decision in significant part on the absence of sufficient evidence *in the legislative history* that Congress meant to "affect the federal-state balance in the way now claimed by the Government." *Id.* at 350. *Accord Pennhurst State School v. Halderman*, 451 U.S. 1, 18 (1981) (finding nothing in the statute "or its legislative history" to suggest that Congress intended to attach certain conditions on the disbursement of federal funds to the States); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Pennhurst* as controlling authority in this context).

Of at least equal significance, *Will* itself did not rest its determination on the absence of an explicit statement in § 1983 of an intent to regulate the States. To the contrary, *Will* analyzed all available indicia of congressional intent. Thus, the Court found that the words used in § 1983 "would be a decidedly awkward way of expressing an intent to subject the States to liability." 491 U.S. at 64. The Court further found that interpreting "persons" to include States would make no sense in terms of the purposes of § 1983. *Id.* at 65-67. And, finally, the *Will* Court reviewed at length the legislative history of § 1983 and concluded that that history "does not suggest a different conclusion." *Id.* at 68. None of this analysis would have been necessary or even useful if the applicable rule of statutory interpretation required a direct and explicit statement of an intent to regulate the States in the language of the statute.

FELA does *not* alter the "usual constitutional balance between the States and the Federal Government" and does *not* constitute a federal limitation on the "historic powers of the States."

The established understanding is that where Congress regulates a class of all entities engaged in a particular form of economic activity that is overwhelmingly but not entirely comprised of privately-owned enterprises—and where the regulation is through rules that are intended to impose uniform obligations on the members of the class —the coverage of state-owned enterprises by the regulation is entirely consistent with the "usual" balance of our federal-state system.

In *Ohio v. Helvering*, 292 U.S. at 368, 369-370, an early leading case, the Court, in holding that a federal tax on liquor distributors applied to state-owned liquor distributors, stated:

> Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress.
>
> * * * *
>
> If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the marketplace seeking customers it divests itself of its *quasi* sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.

This recognition that federal regulation of state-owned "business[es] of a private nature" is *not* a departure

from the norm in our federal system has been uniformly followed. *See supra* at 5-7.

Not surprisingly then, the *Will* Court expressly recognized the distinction—for purposes of determining whether a federal statute alters the usual "balance between the States and the Federal Government"—between a federal statute that covers all state activities, as in *Will*, and a statute that covers only state activities that are within the zone of a general federal commercial regulation. *Will* did so by distinguishing *Jefferson County*, *supra*, in the following way:

> Moreover, the Court in *Jefferson County* was careful to limit its holding to "state purchases for the purpose of competing against private enterprise . . . in the retail market." 460 U.S. at 154. It assumed without deciding "that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions," *ibid.*, which presents a more difficult question because it may well "affec[t] the federal balance." [491 U.S. at 64 n.5.] [6]

[6] *Will*'s citation of the quoted passage from *Jefferson County* presses into service the concept of "traditional governmental functions," a concept that had been adopted by this Court, and then later rejected. to define the limits of congressional power under the Tenth Amendment. *See Garcia*, *supra*, 469 U.S. at 537-47. It is therefore important to emphasize that there is a critical distinction between the "traditional governmental functions" notion as relevant evidence of congressional *intent* and the use of that notion as a basis for determining, under the Tenth Amendment, the extent of congressional *power* to regulate the States.

The question of the intent of Congress on the coverage of an unquestionably constitutional statute—which is the question presented here—is a question of historical fact: Did the Congress that enacted the FELA intend that statute to apply to state-owned railroads? In trying to resolve that issue of historical fact, it is relevant whether, at the time the statute was enacted, the operation of a railroad was understood to be one of the "historic powers" of

This Court's line of decisions from *United States v. California* through *Parden* makes it clear that inclusion of state-owned railroads that are part of the interstate railroad system within the coverage of a federal railroad statute of general application is the paradigm of the type of regulation of state-owned "business[es] of a private nature," *Ohio v. Helvering*, 282 U.S. at 369, that does *not* "alter the usual constitutional balance between the States and the Federal Government." That being so, the "unmistakably clear" rule articulated in *Will* does *not* govern this case. Without further ado, we therefore turn to our discussion of the "ordinary rule of statutory interpretation," *Will*, 491 U.S. at 65, that is pertinent here.

the States the regulation of which would "alter" the usual "balance between the States and the Federal Government."

In contrast, the question raised in the context of the Tenth Amendment—pre-*Garcia*—was not a question of fact but of theory: Are the States immune from a given federal regulation because the regulation would impinge on governmental functions that a court would *characterize* as "traditional," "integral," or "necessary" in nature? *See Garcia*, 469 U.S. at 546. As the Court found in *Garcia*, the defect in relying on such theoretical characterizations for determining the scope of the States' Tenth Amendment immunity is that

> [a]ny rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. [469 U.S. at 546.]

This defect has no application in the present context. While the line between state-owned proprietary enterprises and traditional governmental functions will not always be so clear, in those cases where the activity to be regulated does fit clearly into one category or the other—as of the time Congress acts—it would make no sense to fail to take account of that relevant information as a useful guide to discerning the intent of Congress.

As *Will* recognized in its discussion of *Jefferson County*, there is no reason to assume that Congress intended an implied exception for the States when Congress' regulation does not touch upon what at the time of the enactment were considered traditional governmental functions. In these circumstances, application of a single rule of construction to all situations where a statute might apply to a state function would necessarily result in judicial distortions of the legislative will.

4. In a series of cases dating from at least 1934, this Court has developed and applied a consistent approach to determining whether a federal statute generally regulating industrial or commercial conduct is intended to apply to state-owned entities that engage in activities within the zone of regulation established by the statute. *See supra* at 5-7. As we now show, that approach is true to the basic principle that as long as Congress is acting within the constraints imposed in the Constitution, under Article I the

> Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. . . . It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. [*Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Justice Holmes, sitting as Circuit Justice).] [7]

The first of these decisions of which we are aware is *Ohio v. Helvering*, discussed *supra* at 7 & 11, where the question was whether States were "persons" or "corporations" within the meaning of a federal statute imposing a tax on liquor distributors. The statute made no specific mention of an intent to apply the tax to state-owned liquor stores, nor of an intent to exclude from the tax such liquor stores. The Court—after concluding that a State that engages in a business of a private nature is not immune from the federal taxing power in the conduct of that business—interpreted the statute straightforwardly, without the aid of presumptions or presuppositions. The Court stated that "[w]hether the word 'person' or 'corporation'

[7] For cases citing and following Justice Holmes' formulation in related contexts, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-86, 597-98 (1977) (legislation terminating an Indian reservation); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 387-92 & n.4 (1939) (legislation waiving the federal government's sovereign immunity).

includes a state . . . depends upon the connection in which the word is found." 292 U.S. at 370. The Court then construed those words in the light of the statutory purposes and held that "the state itself, when it became a dealer in intoxicating liquors, falls within the reach of the tax . . . ." *Id* at 371.[8]

The Court's decision in *Ohio v. Helvering* was adopted, and was expanded upon, in *United States v. California*, 297 U.S. at 185-86. The statutory interpretation issue in that case is indistinguishable from the statutory interpretation issue later presented in *California v. Taylor*, and again in *Parden*, and presented once more in the instant case, *viz.*, whether the statutory phrase "every" or "any" common carrier by railroad should be read to include state-owned railroads.

As here, the statute at issue in *United States v. California*—the Safety Appliance Act of 1893—did not expressly include or exclude state-owned railroads. And as here, the state defendant in *United States v. California*, urged the Court to apply a rule of construction that would make the statute inapplicable to state-owned railroads because the statute did not specifically name such entities as within its coverage. The Court unanimously rejected that argument in the following terms:

[8] In a previous decision, the Court had rejected with little discussion the suggestion that agents of the State who engaged in the sale of liquor were not covered by the federal liquor tax, since the broad, general statutory language allowed for "little doubt" on this score. *South Carolina v. United States*, 199 U.S. 437, 447 (1905). The Court then proceeded in the bulk of its opinion to address the State's contention that Congress was without the constitutional *power* to subject the States to such a tax. The Court rejected this contention as well. In so doing, the Court noted that "[t]here is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed 'public utilities,' including not merely therein the supply of gas and water, *but also the entire railroad system*." *Id.* at 454 (emphasis added). In view of this movement, the Court found that the federal taxing power could easily be subverted were Congress denied the power to reach commercial activity conducted by the States. *Id.*

> Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it . . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of the statute fairly to be inferred be disregarded because not explicitly stated . . . . We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose application in the circumstances would be highly artificial. [297 U.S. at 185-86 (citations omitted).] [9]

United States v. California was in turn expressly followed in each of the succeeding decisions of this Court addressing whether a regulatory statute applied to a state-owned entity that was indistinguishable for purposes of the regulation from a privately owned entity. *See California v. United States*, 320 U.S. at 585-586; *California v. Taylor*, 353 U.S. at 562; *Parden*, 377 U.S. at 187-90; and *Jefferson County*, 460 U.S. at 154-62 & n. 21.

Justice Frankfurter, writing for the Court in *California v. United States*, went to the heart of the matter:

> We need not waste time on useless generalities about statutory construction in order to conclude that

[9] The formulation of the canon of construction invoked by the respondent in *United States v. California* appears to have been a misstatement, because the enacting sovereign was the Federal Government, not the State that was seeking to avoid coverage by the statute. Nevertheless, the analysis stated in the remainder of the passage is applicable regardless of the precise terms of the canon sought to be applied. *See Jefferson County*, 460 U.S. at 161 n.21.

> entities other than technical corporations, partnerships and associations are "included" among the "persons" to whom the Shipping Act applies if its plain purposes preclude their exclusion. The critical question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies. [320 U.S. at 585-586.]

See also, e.g., Jefferson County, 460 U.S. at 157. (In finding that the States when engaged in the resale of pharmaceuticals in competition with private enterprises were "persons engaged in commerce" within the meaning of the Robinson-Patman Act, the Court stated that: "[t]he plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act.").

5. An examination of the language and purpose of the FELA, pursuant to the principles of statutory construction that we have just shown have been consistently followed by this Court, leaves little doubt that the issue the state defendant in this case wishes to revisit was correctly decided in the first instance by *Parden*.

The starting point is, as this Court has so often emphasized, the language of the statute itself. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 606 (1989); *Dole v. United Steelworkers of America*, —— U.S. ——, 110 S.Ct. 929, 934 (1990). Here, the critical language of the statute is all-encompassing and admits of no exceptions: "*Every* common carrier by railroad while engag-

ing in commerce between any of the several States . . . shall be liable in damages to any person suffering injury" due to the negligence of the carrier. 45 U.S.C. § 51 (emphasis added).

As we have already discussed, virtually identical language has been used to define the scope of the series of federal statutes that together comprise the comprehensive scheme of federal regulation of the interstate railroad system. *See supra*, at 6 (discussing Safety Appliance Act and Railway Labor Act language and precedents).[10] *Parden*, and each of the other decisions of this Court construing this language, have correctly placed great weight on the scope of the words chosen by Congress, and have determined that Congress intended to adopt *uniform* federal regulation of the interstate railroad system, including regulation of any parts of that system operated by state-owned enterprises.

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[10] In addition to the FELA, the Safety Appliance Act, and the Railway Labor Act, the Interstate Commerce Act also extends, in similar broad general language, to the interstate rail system, covering all interstate transportation

> (1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—
>
> (A) only by railroad;
>
> (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or
>
> (C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil. [49 U.S.C. § 10501.]

Other federal railroad regulation statutes with similarly broad and general coverage provisions include, *e.g.*, the Railroad Retirement Act of 1974, 45 U.S.C. 231 ("[t]he term 'employer' shall include," *inter alia*, "any express company, sleeping car company, and carrier by railroad" subject to the jurisdiction of the ICC); the Railroad Unemployment Insurance Act, 45 U.S.C. § 341 (same); the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 ("[t]he term 'railroad' as used in this subchapter means all forms of non-highway ground transportation that run on roads or electro-magnetic guideways . . ."); and the Hours of Service Act, 45 U.S.C. § 61 ("[t]he term 'railroad' shall have the same meaning as when used in the Federal Railroad Safety Act of 1970").

Thus, in *Parden*, the Court held that "in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, [Congress] meant what it said." 377 U.S. at 187. Similarly, in *United States v. California*, the Court found the "all-embracing language" of the Safety Appliance Act—"*any* common carrier engaged in interstate commerce by railroad"—to be "so plain" as to remove any doubts concerning the applicability of the Act to state-owned railroads. 297 U.S. at 185-87. And in *California v. Taylor*, the Court held that "[t]he fact that Congress chose to phrase the coverage of the [Railway Labor] Act in all-embracing terms indicates that state railroads were included within it." 353 U.S. at 564. Indeed, in *California v. Taylor*, the Court specifically noted that

> the consistent congressional pattern in railway legislation which preceded the Railway Labor Act, [including the FELA], was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included. [*Id.*] [11]

The deference these decisions paid to the use of the word "every" or "any" in the statutes' definitions of coverage is consistent with this Court's decisions finding other statutes with all-embracing definitions of coverage applicable to state-owned entities. *See supra* at 6-7 (collecting and quoting the statutory language from the applicable precedents).

As a more general matter too, this Court has understood the use by Congress of such all-embracing terms as "every," "any," or "all" to reflect a congressional in-

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[11] Even before this Court's holdings in the cases cited in text, the Interstate Commerce Commission had held that the Interstate Commerce Act, *see* n.10, *supra*, governs state-owned railroads. *See California Canneries Co. v. Southern Pacific Co.*, 51 ICC Rep. 500, 502-03 (1917); *United States v. Belt Railroad*, 56 ICC Rep. 121, 121-22 (1919); *Texas State Railroad*, 34 ICC Val. R. 276, 276-77 (1930).

tent that there be no exclusions from the scope of the statute.[12]

The broad sweep of the coverage language of the railroad statutes is not a happenstance, but rather reflects Congress' overall objective in enacting these laws. Congress intended through this inter-related series of enactments to improve the safety and efficiency of the interstate railroad system by providing uniform and comprehensive regulation of the system as a whole and to foreclose any regulation by the States that might impinge upon this uniform regulatory scheme. *See, e.g., United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678, 688 (1982) ("[T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. . . . A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system.").

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[12] For example, in *Baltimore National Bank v. State Tax Commission*, 297 U.S. 209 (1936), the question presented was the power of the States to tax bank shares owned by the Reconstruction Finance Corporation, an agency of the United States. The federal statute at issue provided that "all" shares of national banks operating within the jurisdiction of a State were subject to State taxation. The Court held that the "manifest intention" of Congress was—as the statute expressly provided—to subject "all" national bank shares to state taxation, without regard to whether the shares were owned by an instrumentality of the United States. 297 U.S. at 212-13. The Court found that "[i]n such a situation the burden is heavily on the suitor who would subject the word 'all' with its uncompromising generality to an unexpressed exception." *Id.* at 212. *See also id.* at 215 ("Across the petitioner's path there still lies the stumbling block of that uncompromising 'all' ").

United States v. Monsanto, 491 U.S. at 606-611, makes the same point; *viz.*, that in subjecting "any" and "all" property derived from a criminal offense to forfeiture, Congress intended "no exception . . . for the assets used to pay attorney's fees—or anything else, for that matter." *See also McLean v. United States*, 226 U.S. 376, 383 (1912) (" 'All' excludes the idea of limitation . . . .").

The history of the FELA itself manifests this congressional approach. Congress made clear that one of its purposes in passing the FELA—which established a negligence standard for common carriers and eliminated such traditional employer defenses as the "fellow servant rule" —was to induce carriers "to exercise the highest degree of care in selecting competent and careful persons and . . . to exercise over employees an authority and influence which will compel the highest degree of care on their part for the safety of each other in the performance of their duties." H.R. Rep. No. 1386, 60th Cong., 1st Sess. 2 (1980); *see also id.* at 3 (elimination of fellow servant rule "will be conducive to greater care in the operation of railroads"). And, Congress also declared that this purpose was to be served by establishing the FELA's standards as uniform throughout the interstate rail system. *See* H.R. Rep. No. 1386, *supra*, at 1 (the FELA is "intended in its scope to cover all commerce to which the regulatory power of Congress extends . . . [in order] to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees").

In its first examination of the FELA, this Court recognized that the Act's protection of employee safety was part of an overall policy of promoting secure and efficient interstate commerce:

> If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind of quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less

> economical, and less secure. [*Second Employers' Liability Cases*, 223 U.S. at 48; *see also United States v. Lowden*, 308 U.S. 225, 235-37 (1939); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930); *Minneapolis, St. P. & S. Ste. M.R. Co. v. Rock*, 279 U.S. 410, 413-14 (1929).]

And, soon thereafter, the Court recognized that this policy was intended to be accomplished by giving the FELA uniform and exclusive effect throughout all of the interstate rail system:

> Whether and in what circumstances companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line . . . . It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. . . . [I]t was intended to be *very comprehensive*, to withdraw *all* injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. [*New York Central R. Co. v. Winfield*, 244 U.S. 147, 149-50 (1916) (citations omitted; emphasis added).]

This Court has also recognized that in both of these regards the FELA is at one with the overall federal scheme for regulating the interstate railroad system.

Thus, this Court has recognized that the FELA is part of a regulatory scheme of numerous railroad employee safety and welfare statutes which seek to improve the efficiency of the interstate rail system by preventing employee-related interruptions of commerce. *See United States v. Lowden*, 308 U.S. at 237-38 (grouping the FELA, the Safety Appliance Act of 1893, the Hours of Service Act of 1907, and various other statutes together

as "designed mainly to insure the safety and welfare of railroad employees . . . [in order to] foster[] the commerce in which the employees were engaged").

And, this Court has recognized that virtually all federal railroad statutes—including, as already discussed, the FELA—were intended to establish uniform standards throughout the entirety of the interstate railroad system, and thus to pre-empt state regulation of that system. *See, e.g., Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (Interstate Commerce Act); *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 321-24 (1972) (Railway Labor Act); *Schwabacher v. United States*, 334 U.S. 182, 191-92 (1948) (Transportation Act); *Southern R. Co. v. Railroad Commission*, 236 U.S. 439, 446-48 (1915) (Safety Appliance Act); *Northern P.R. Co. v. Washington ex rel. Atkinson*, 222 U.S. 371, 376-77 (1912) (Hours of Service Act).

The railroad industry has been described by this Court as "'a state within a state.'" *California v. Taylor*, 353 U.S. at 565-66 (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)). And the FELA has been described as one piece of a "consistent congressional pattern" of legislation intended by Congress to govern this "state within a state" in a comprehensive and uniform manner. *California v. Taylor*, 353 U.S. at 562-67. In legislating so comprehensively in this field, Congress has sought to prevent *any* potential interference with interstate commerce by railroad. *Id.* at 566. *Accord, e.g., Second Employer's Liability Cases*, 223 U.S. at 48; *United States v. Lowden*, 308 U.S. at 234-40. This objective obviously would be undermined if state-owned railroads were permitted to operate portions of the interstate railroad system according to different rules and standards than those required by the federal enactments. As the Court has stated in the context of the Safety Appliance Act:

> The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection. [*United States v. California*, 297 U.S. at 185.] [13]

6. We have shown to this point that *Parden* and the other railroad cases correctly concluded that state-owned railroads are subjected to the various statutes that comprise the federal scheme of regulation of the railroads.

But even assuming *arguendo* that there were doubts about *Parden*'s statutory holding—and that the FELA arguably contains an unwritten exception to "[e]very," the word that *is* written in the statutory language—there would still be no basis for a departure from *stare decisis* under the circumstances of this case. As the Court recently stated in *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989):

> [W]e have held that "any departure from the doctrine of *stare decisis* demands special justification." . . . We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in

[13] *See also United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. at 689 ("To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.").

> the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. [*Id.* at 172-173 (citation omitted).]

In *Patterson*, the Court identified three factors that might present "special justification" for overruling a prior statutory interpretation. Those factors are (1) "the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress," 491 U.S. at 173; (2) the precedent has become "a positive detriment to coherence and consistency in the law," *id.*; and (3) the precedent has been found "inconsistent with the sense of justice or with the social welfare," *id.* at 174. None of these factors support a departure from *stare decisis* here.

First, Congress has not acted to overturn *Parden* or any of those other precedents of this Court (or of the ICC) holding that state-owned railroads are within the scope of federal statutes applicable generally to railroad carriers. Indeed, in 1939—after the decisions in *United States v. California*, *supra*, and the ICC cases—Congress enacted a major revision of the FELA that left undisturbed the statutory phrase "[e]very common carrier by railroad." *See* 53 Stat. 1404.

Even if, contrary to what we have argued here, the Court would today apply a different and more stringent standard for ascertaining a congressional intent to apply federal enactments to the States, that possibility hardly presents an occasion for revisiting the question whether the 1908 Congress intended to cover state-owned railroads in enacting the FELA or whether the 1939 Congress so intended in revising the Act. Unless Congress was aware in 1908 or 1939 that the Court might likely apply an "unmistakably clear" rule or some variant thereof in cases of this sort, it makes little sense to judge congressional enactments in that time period under a set of newly an-

nounced rules of construction. *See Cannon v. University of Chicago*, 441 U.S. 677, 698-699 (1979) ("We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action [taken prior to those cases] must take into account its contemporary legal context.").

Second, it can hardly be contended that adherence to *Parden* would be a "positive detriment to coherence and consistency in the law." As we have shown, this Court has, in a line of decisions spanning half a century, consistently upheld the application of general federal regulatory statutes to state-owned enterprises within the zone of the particular federal regulation. *See supra* at 5-7. Adherence to *Parden* would promote rather than frustrate coherence and consistency in the law—and in particular would promote coherence and consistency in the series of federal laws regulating the interstate railroad system.

Third, the decision in *Parden* is not "inconsistent with the sense of justice or with the social welfare." There has been no change in the collective values of our society that would render application of the FELA to state-owned railroads any less consistent with our collective sense of justice or social welfare than at any previous time. And, as far as we know, there has been no contention to the contrary.

CONCLUSION

For the foregoing reasons the decision of the South Carolina Supreme Court should be reversed.

Respectfully submitted

ROBERT M. WEINBERG
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390